

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL STEVEN MITCHELL,

Defendant-Appellant.

UNPUBLISHED

March 23, 2010

No. 286416

Antrim Circuit Court

LC No. 07-004133-FH

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

MEMORANDUM.

Following a jury trial, defendant appeals by right his conviction of operating a motor vehicle while intoxicated causing death, MCL 257.625(4). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arose from a collision between his pickup truck and a motorcycle. The collision killed the motorcyclist. After the collision, both defendant and the motorcyclist had discernable levels of alcohol in their blood. Testimony indicated that the motorcyclist's blood alcohol level was under the legal limit, while defendant's level was at or above the legal limit. There was conflicting expert testimony at trial concerning the cause of the accident and whether the motorcyclist was speeding.

Defendant claims that his substantial rights were negatively impacted when the prosecutor plainly and erroneously presented incorrect and confusing information concerning gross negligence, and attempted to shift the burden of proof to defendant. After considering the entirety of the arguments made by both parties, we conclude that the prosecutor's statements were responsive to defendant's theory of the case, and were permissible. *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). Moreover, we find the prosecutor's description of superceding cause and of gross negligence to have been consistent with our Supreme Court's explanation of those concepts in *People v Schaefer*, 473 Mich 418, 438-439; 703 NW2d 774 (2005), overruled in part on other grounds; *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006).

To the extent defendant seeks to attribute error to the jury instructions, we find defendant expressly approved of the instructions and such waived any alleged error. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Even if this issue had not been waived, and instead was subject to review for plain error affecting defendant's substantial rights as an unpreserved

issue, see *People v Carines*, 460 Mich 750, 766-767, 772-773; 597 NW2d 130 (1999), reversal would not be warranted.

“Even if somewhat imperfect, [jury] instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). There has been no argument that the trial court misstated or omitted any element of the charged offenses or the burden of proof, and no significant argument that the instructions did not fairly present the issues for trial. The trial court may have, as pointed out by defendant, misspoke concerning “slight cause” but it immediately corrected itself. In all other respects, the trial court correctly defined the elements of the charged offenses and the factors the jury was to consider in rendering its verdict. Viewing the instructions as a whole, we are satisfied that they were not confusing, and that they both fairly presented the issues to the jury and sufficiently protected defendant’s rights.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood